United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7063

75 - 7063

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No 75 - 7063

SILAS RAPPNER

Plaintiff-Appellant

-V-

CASPAR WEINBERGER, Secretary of Department of Health, Education and Welfare, Social Security Administration.

Defendant-Appellee

On Appeal From a Memorandum and Order of The United States District Court For The Southern District Of New York.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Supplemental Statement of Facts

Plaintiff-appellant proves that the government's problem as presented by the appellee's attorney is a lack of merit in the allegations against this appellant.

Fundamentally, the defense does not have any kind of a law suit at all and they have come to realize it.

To quote former U.S. Attorney, Whitney Seymour, Jr, the strategists have employed "a common courtroom device used by trial lawyers to divert attention from the facts of the case by attacking the adversary. The concept was articulated by Cicero 'when you have no basis for an argument, abuse the plaintiff.'

" In modern times, the advise shared among lawyers is:

when you are weak on the facts,argue the law.When you are weak on the law,argue the facts.When you are weak on both the law and the facts,attack by perfectly irrelevant citations of cases that are completely immaterial by assuming as a fact that they are relevant which is absolutely improper as a matter of law."

"Justice is not a game or a sport.Laws are not enacted as the rules for tournaments."

The following quote from Chief Justice Warren Burger at the National Conference on the Judiciary on March 12,1971: "Man can tolerate many shortcomings of his existence but history teaches us that great societies have foundered for want of an adequate system of justice-and by that I mean justice in its broadest sense."

The following is mandated by substantial errors in law and fact contained in defendant-appellee's brief of April 3, 1975.The same errors of law and fact are repeated in the decision and order to remand entered in the District Court by the Honorable Judge H.F.Werker on December 10,1974.

The final decision of the Appeals Council controlled by the defendant-appellee was"denied -statutory time limitation" which was reversed in 1973 by the Honorable Judge M.I.Gurfein, now a member of the Court of Appeals.

On page 1,paragraph 1 of the appellee's brief of April 3,1975 is the following:"The Hon.H.F.Werker affirmed in part and remanded in part the final determination of the defendant-appellee."

On the last page of the district court judge December 10,1974 decision and order is the following statement: "the findings of the Secretary,as to the plaintiff's claim for increased benefits due to wages earned in 1942-1944 are affirmed. The case is remanded for additional findings as to 1958,1959 and 1960 wages as outlined above."

The statement by the appellee's attorney on page 1, paragraph 1 of the April 3,1975 brief and the statement by District Court Judge Hon.H.F.Werker on the last page of Dec.10, 1974 decision and order entered in the district court,coincide hand in glove.

Both statements are fatal to the defendant-appellee because they are based on erroneous conclusions predicated upon erroneous "facts."

It is emphasized at this point that the final decision of the Appeals Council and the hearing examiner in the certified transcript are the same:"denied on grounds of statutory time limitation."

Under 42 U.S.C.Sec.405(g) the proper standard is: "the findings of the Secretary as to any fact if supported by substantial evidence shall be conclusive."

The District Court Judge,Hon.M.Gurfein(now a member of the U.S.Court of Appeals),reversed the final decision of the Secretary of HEW which was "statutory time limitation."

There was no substantial evidence to support the appellee's decision. In fact exhibit A25 clearly states that the benefit computation years beginning in 1951 and the elapsed years to 1961 and five years of highest earnings of credited and recorded wages for that period pursuant to the Social Security Law, amendments of 1960 and 1961 is the basis of computing the credited wages of this appellant under Section 215 of the Social Security Act.

There is substantial agreement between the parties as to the credited wages on the record. The five best years selected for computation are as follows - 1951, 1952, 1958, 1959 and 1961 and the total wages are $8891.

Title 28 - Provision 1738. Due process does not give parties right to litigate the same question twice ; the U.S. C.A. Constitution, Art 4-Prov.1 requires that there be an end of litigation tried once and that matters once tried shall be considered forever settled as between the parties.

All the citations of authorities referred to in the appellee brief of April 3,1975 are irrelevant to this case.

Title 28 - Provision 1291 provides that a final decision of the Secretary can be appealed to the U.S. Court of Appeals.

Title 28 - Provision 42 provides that certified transcript of decisions of the record by the Appeals Council and the administrative law Judge shall be final pursuant to 5 U.S.C.

20(CFR)404.951. The decision of the Appeals Council and the decision of the administrative law Judge shall be final and binding upon all parties to the hearing.

If appellant has established a prima facie case,the burden of going forward with evidence to refute it is upon the appellee.

Fruit Canners V Walker 90 Fed 753

A district court abuses its discretion under the statute if it takes judicial notice of a fictious pleading by the appellee when it is not pleaded by the appellant but it is implied by the appellee that appellant so pleaded.

Walton V American Oil Co C.A.233F2d 541

The statement on page 1,paragraph 1 of the appellee's brief of April 3,1975 and the allegations on the last page, last paragraph of December 10,1974 regarding 1942-1944 and 1958 and 1959 coincide hand in glove and both allegations are fictictious.

From 1960 to 1974 Over eight million retired U.S. citizens age 65 have become old age insurance beneficiaries under the Social Security Law amendments of 1960 and 1961. Congressional quartly information by Social Security Administration.

Mr.Justice Marshall,U.S.Supreme Court,U.S.406, ruled that the Social Security Act itself requires equal rights for each individual who meets the requirements of the Social Security Act and argued that Congress intended to prohibit

any discrimation in the administration of the act.Civil Rights Act of 1964 - 42 U.S.C.prohibits discrimation in federal programs.

ARGUMENT

POINT 1

On December 10,1974,the district court "ordered the case remanded for additional findings as to the 1958,1959 and 1960 wages as outlined above." "the findings of the Secretary as to the plaintiff's claim for increased benefits due to wages earned during 1942-1944 are affirmed."

The appeal from the order by the district court on December 10,1974 remanding to Secretary for additional findings as to the 1958,1959 and 1960 wages is based upon a statutory regulation of the government agency - 20(CFR)404.951 as follows: "the decision of the Appeals Council and the administrative law judge shall be final and binding upon all parties to the hearings."

Title 28 U.S.C -Provision 1291 provides that a final decision of the Secretary is appealable.Under 42 U.S.C.405(g) provides:the findings of the Secretary as to any fact if supported by substantial evidence shall be conclusive.

In the final decision of the Secretary on Nov.21,1972, relating to this appellant's case,the decision,"denied-statutory time limitation" was final. Judge Gurfein reversed this decision early in 1973.Appellee's attorney in June 1973 filed a Motion to dismiss which the Court denied (Docket).

This appellant and the appellee agree as to the wages credited and recorded on the Secretary's records (exhibit A18) for 1958 and 1959 as shown by appellant in his brief of March 3,1975. No issue on this point of 1958 and 1959 wages.

Under Title 28 U.S.C. Provision 1733 provides that a copy of a government document such as a U.S.Treasury form showing wages from employer paid for 1960(although earned in 1959) as commission on an installment contract is admissible as evidence equally with the original thereof.

Kuzrock V U.S.C.A.1F2d 209

Judge Gurfein adjudicated as admissible on Oct 29,1973 the evidence in the transcript issued by the Appellee when his Honor endorsed the Amended Complaint containing the 1960 U.S. Treasury form showing wages paid by the employer in 1960 but earned in 1959.(Docket Sheet).

Thus the order by the district court on Dec.10,1974 "to remand to the Secretary for additional findings as to the 1958,1959 and 1960 wages" is unduly repetitious as to facts, illegal as a matter of law and contrary to Title 28 U.S.C. Provision 1738 which provides that due process does not give parties the right to litigate the same question twice ;and the U.S.Court ofAppeals Constitution,Art.4 Prov.1 requires that there be an end of litigation tried once and that matters once tried shall be considered forever settled as between the parties.

POINT II

The December 10,1974 district court decision and order on the last page states: "The findings of the Secretary as to the plaintiff's claim for increased benefits due to wages earned during 1942-1944 are affirmed."

The final decision of the Secretary as to the certified transcript verifies "denied-statutory time limitation" which was reversed by Honorable Judge Gurfein.

The 1942-1944 wages is not an issue in this case.The employers of the appellant in 1942 deducted social security taxes and the wages are credited on the records of the Secretary.(exhibits A18,A19). In 1943 the employer deducted social security taxes and the wages are recorded on the records of the Secretary.

The district court erred on December 10,1974 when the court accepted from the Appellee's attorney the fictictious pleading relating to 1942-1944 years having non-reporting employers,contrary to the truth as recorded on the Secretary's records.

The appellant does <u>not</u> plead that increased benefits are due because of 1942 and 1943 earnings;while it is implied by the appellee's attorney that the appellant does so plead; the district court on Dec.10,1974 abused its discretion when the court took judicial notice of this ficticious pleading

CONCLUSION.

For the foregoing reasons, the decision and order of December 10,1974 by the district court should be denied.

Respectfully submitted

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April 14,1975